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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

In re the Marriage of LOUIS FRANECKE and RITA MELKONIAN.	
LOUIS S. FRANECKE, Appellant, v. RITA MELKONIAN, Respondent.	A151670 (Marin County Super. Ct. No. FL1400242)

Respondent Rita Melkonian (Melkonian) and petitioner Louis Franecke (Franecke) signed a premarital agreement (PMA) on May 5 and 6, 1999, respectively, marrying shortly thereafter on May 8. The marriage did not last. Some 17 years later, Franecke and Melkonian were engaged in a different enterprise: a divorce and dispute over the division of certain property related to their former home on Miwok Drive in Novato, CA (the Miwok house), which had been designated "community property" by the PMA. The property in question included settlement funds from a lawsuit filed against Masma Construction, the company from whom Franecke and Melkonian purchased the Miwok house (the Masma lawsuit).

On May 1, 2017, the trial court held as follows: (1) pursuant to the PMA, settlement funds recovered from the Masma lawsuit were community property; (2) pursuant to the PMA, Franecke was entitled to no more than $350,000 reimbursement for the down payment he made on the Miwok house; (3) by signing the PMA, Franecke

waived his right to any Family Code section 2640 reimbursement for separate property contributions to improvements for the Miwok house; and (4) pursuant to Family Code section 1617, Franecke was barred by laches from claiming reimbursement for mortgage, taxes, and insurance payments he made on the Miwok house.[1]

Franecke appeals from the judgment entered pursuant to that order, arguing that the trial court erred in making all of those findings. We agree with Franecke only with respect to his rights under section 2640 and remand on that limited basis.

BACKGROUND

Franecke and Melkonian met in December 1997 and were engaged in August 1998. Franecke is a lawyer and Melkonian is a doctor. In October 1998, the parties contracted with Masma Construction (Masma) for the purchase of a lot on Miwok Drive in Novato, as well the construction of a residence there. Both Franecke and Melkonian signed the agreement with Masma.

On May 5 and 6, 1999, respectively, Melkonian and Franecke signed the PMA, providing, inter alia, that "the house and lot located at [on Miwok Drive in] Novato, California 94947 is community property." The PMA also included the following provisions: "The parties also agree [Franecke] made the down payment on this house in the sum of approximately three hundred fifty thousand dollars ($350,000). At such time as this house is sold, [Franecke] shall receive reimbursement of the down payment only and the remaining equity shall be divided equally between the parties. The parties agree the mortgage, taxes and insurance payments for the Novato residence shall be paid one-half by [Franecke] and one-half by [Melkonian]." According to Franecke, at the time he signed the PMA, he was unaware of the existence of section 2640, which governs reimbursement for separate property contributions to the acquisition of community property.

Melkonian and Franecke married on May 8, 1999.

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[1] All subsequent statutory references are to the Family Code unless otherwise noted.

Franecke testified at trial that by August 2001, he had spent approximately $215,000 to build and improve the Miwok house when he learned "that Masma had allowed the property to go into foreclosure." Shortly thereafter, on October 12, Franecke executeded a claim of mechanic's lien on the Miwok house. On October 17, Franecke and Melkonian served Masma notice that if Masma did not compensate Franecke and Melkonian, "a Mechanics' Lien . . . may be placed against the property." Sent from "Louis S. Franecke, Esq." of "Franecke Law Group," the notice lists Franecke and Melkonian jointly as "claimant," and both of their signatures appear on the document. Six days later, in his capacity as an attorney, Franecke filed against Masma a "complaint for breach of contract and to foreclose mechanics' lien." The complaint lists both Franecke and Melkonian as plaintiffs, and alleges that "Plaintiffs, Louis S. Franecke, and Dr. Rita Melkonian were and . . . are individuals engaged in supplying of engineering services, design, supply of labor and materials," etc., to the Miwok house. The complaint further alleges that "Louis S. Franecke and Dr. Rita Melkonian" furnished goods and services whose "reasonable . . . market value" is $325,000. Finally, the complaint refers to the claim of lien filed against the Miwok house as "the claim of lien of Plaintiffs Franecke and Melkonian."

On April 10, 2002, "Dr. Rita Melkonian and Louis S. Franecke (collectively 'Buyers')" entered into a "settlement agreement and release" with Masma. The settlement agreement and release provides that, "in consideration for" Masma's payment of $210,000 "to Buyers," the "Buyers . . . hereby release and discharge Masma . . . of and from all . . . liabilities" associated with the Masma lawsuit. At trial, Franecke testified that the total value of the settlement was "what amounted to approximately $252,000 in two years." The signatures of both Melkonian and Franecke appear on the settlement agreement. Considering the settlement funds to be his separate property, Franecke deposited them into his "own separate operating expenses" account.

At trial, Franecke testified that he made a down payment on the Miwok house in the amount of $524,704, defining "down payment" as "what cash I needed to expend to purchase the house." At the time of the PMA, the exact amount of the down payment on

the Miwok house was uncertain. According to Franecke, the PMA addressed this uncertainty by providing for a down payment of "approximate[ly]" $350,000, where the word "approximate[ly]" was employed "to memorialize that [Franecke] would be" making the down payment—"*whatever it was*—and then it would come back" to him upon the Miwok house's sale. However, Melkonian testified that the attorney representing her with respect to the PMA was reluctant to include the $350,000 figure because Franecke had not produced "any evidence to show that he had spent the 350." On this question, "[a] lot of discussion went on between [Melkonian's] attorney and Mr. Franecke" until finally, Melkonian signed the PMA with the understanding that Franecke would receive $350,000 reimbursement for a down payment "despite the fact that we know he hasn't put in 350."

Notwithstanding the language of the PMA providing that "mortgage, taxes, and insurance payments" on the Miwok house "be divided equally between the parties," Franecke paid those costs himself, with no contribution from Melkonian. At trial, Melkonian testified that Franecke never spoke to her about mortgage payments and that when they moved into the Miwok house, "the agreement was that [she would] take care of everything in the house and he [would] pay the mortgage and the taxes." For his part, Franecke testified that he repeatedly asked Melkonian "when [she was] going to start helping [him] pay for these things," but never demanded payment and never told Melkonian that he would be expecting reimbursement for the payments he had already made.

In October 2016, the Honorable Verna A. Adams presided over trial of the issues related to the PMA and the Miwok house. On May 1, 2017, Judge Adams issued a Statement of Decision documenting her rulings in the case. The trial court found that the $252,000 received in settlement of the Masma lawsuit was community property and that Franecke had stipulated at trial "that the Masma money should be added on to the community equity in the house." With respect to the down payment, the court found that the terms of the PMA limited reimbursement to $350,000 and that by agreeing to those

terms, Franecke had waived any additional reimbursement to which he might have been entitled under section 2640.

Finally, the court addressed the matter of the various payments made on the Miwok house by Franecke alone. According to the court's Statement of Decision, "[t]he parties agree[d] that the subject was simply never discussed." Because Franecke acted as Melkonian's real estate attorney, the court reasoned that he had an additional fiduciary duty as her lawyer; accordingly, Melkonian "had the right to expect [him] not to take advantage of her by any acts of commission or omission." Accordingly, based on laches, the court found that Franecke was barred from seeking reimbursement for monthly payments on the Miwok house.

This appeal followed.

DISCUSSION

Franecke argues that the Masma lawsuit settlement funds were his separate property pursuant to the PMA and that the trial court erred in treating them as equity in the Miwok house. He further contends that the down payment provision of the PMA does not limit reimbursement and he is therefore entitled to the entirety of the purported $524,704 down payment he made on the Miwok house. Apart from and in addition to the down payment, Franecke asserts rights under section 2640 to reimbursement for his alleged $362,144 in separate property contributions to the Miwok house. Finally, he disputes the trial court's application of the equitable doctrine of laches, reasserting his claim to half of the monthly payments he made on the Miwok house. We find merit only in Franecke's claim under section 2640 and remand on that basis alone.

I. The Masma Lawsuit Settlement Was Community Property.

Franecke argues that the Masma lawsuit sought to recover his own separate property investments in the Miwok house, and in turn, that any settlement of that lawsuit should be deemed his own separate property. However, the lawsuit itself purports to concern investments in the Miwok house by both Franecke and Melkonian. The Masma settlement provided that Masma would pay both Franecke and Melkonian to relinquish

any legal claims they had against Masma related to the lawsuit. That agreement required, and bore, the signatures of both Franecke and Melkonian. In short, nothing within the four corners of the Masma lawsuit and settlement agreement supports Franecke's contention that the settlement proceeds constitute his own separate property. Accordingly, we find that the trial court did not err in finding the Masma lawsuit proceeds to be community property. [2]

Similarly unfounded is Franecke's objection to the trial court's allocation of the $252,000 from the Masma settlement to equity in the Miwok house. "Family courts have . . . been granted broad statutory powers to accomplish a just and equal division of marital property (Fam. Code, §§ 2550, 2553) and possess 'broad discretion to determine the manner in which community property is awarded in order to accomplish an equal allocation.' " (*In re Marriage of Gréaux & Mermin* (2014) 223 Cal.App.4th 1242, 1250, citing *In re Marriage of Andresen* (1994) 28 Cal.App.4th 873, 880.) Here, by depositing those settlement proceeds into his own separate account, Franecke reaped the exclusive benefit of the settlement money for years. In light of those circumstances, the trial court did not abuse its discretion by allocating the Masma lawsuit settlement funds to equity in the Miwok house.

[2] Our finding in this respect renders moot Franecke's insistence that he did not stipulate to the Masma settlement being community property. Still, it is worth noting that in open court, both Franecke and his attorney repeatedly represented that there was such a stipulation. Even if, as Franecke argues, those representations did not constitute stipulations in the technical sense, judicial estoppel prevents him from retracting them after trial, as he attempted to do here. " ' "Judicial estoppel prevents a party from asserting a position in a legal proceeding that is contrary to a position previously taken in the same or some earlier proceeding." ' " (*Scripps Clinic v. Superior Court* (2003) 108 Cal.App.4th 917, 943 [where plaintiff had taken the position that defendant committed the alleged tortious act in defendant's capacity as a medical professional, plaintiff was judicially estopped from claiming that the same tortious act was administrative in nature].)

II. The PMA Limited Down Payment Reimbursement to Approximately $350,000.

The PMA provided that Franecke "made the down payment on [the Miwok] house in the sum of approximately three hundred fifty thousand dollars ($350,000)," and that upon sale of the property, Franecke "shall receive reimbursement of the down payment only," with the rest of the equity divided equally between Franecke and Melkonian. Franecke argues that $350,000 was merely the figure "guessed" at by the parties, and that the agreement entitles him to reimbursement of any down payment he made, even one well in excess of the sum approximated in the PMA. Melkonian argues that the $350,000 limited Franecke's potential down payment reimbursement.

"[E]xtrinsic evidence is admissible to resolve an ambiguity. . . . The trial court's determination of whether an ambiguity exists is a question of law, subject to independent review on appeal. [Citation.] The trial court's resolution of an ambiguity is also a question of law if no parol evidence is admitted or if the parol evidence is not in conflict. However, where the parol evidence is in conflict, the trial court's resolution of that conflict is a question of fact and must be upheld if supported by substantial evidence." (*WYDA Associates. v. Merner* (1996) 42 Cal.App.4th 1702, 1710.)

Here, the trial court heard testimony from Franecke, who alleged that the parties intended the PMA provision in question to provide that Franecke would be reimbursed for the down payment, "whatever it was," $350,000 or significantly more. On the other hand, Melkonian testified that her attorney suspected that the actual down payment could be lower than $350,000; accordingly, Melkonian understood the provision to mean that Franecke could receive $350,000 "reimbursement" for the down payment, even if he made a smaller down payment. Thus, crediting Franecke's testimony would resolve the ambiguity in favor of finding that the PMA's down payment reimbursement provision was virtually unlimited, while crediting Melkonian's testimony would support the conclusion that the PMA requires any reimbursement to hew closely to the $350,000 estimate.

In its Statement of Decision, the trial court credited Melkonian's account: "Wife described the genesis of the $350,000 language fairly accurately when she explained that when the parties signed the PMA, the down payment money had not been spent and both parties knew that, notwithstanding the language in the PMA. At the time that agreement was being negotiated, Wife's attorney requested documentation about the down payment amount. Husband did not have such documentation. They agreed that Husband was going to make the down payment, and they settled on that number."

In essence, the trial court relied upon extrinsic evidence to determine the meaning of an ambiguous contractual term, and that determination was based on the trial court's factual finding regarding "the genesis of" the disputed term. Thus, the trial court's resolution of the conflict over the genesis of the $350,000 language "is a question of fact and must be upheld if supported by substantial evidence." (*WYDA Associates. v. Merner*, *supra*, 42 Cal.App.4th at p. 1710.) More to the point, the trial court's finding was so supported: Melkonian testified regarding her conversations with the lawyer who represented her with respect to the PMA and faced cross-examination on that topic from Franecke. Her explanation as to this aspect of the PMA makes sense. Because substantial evidence supports the trial court's finding as to the down payment provision, that finding will not be disturbed here. In sum, Franecke received the down payment reimbursement he was owed.

III. Franecke's Other Separate Property Contributions to the Miwok House Qualify for Reimbursement Under Section 2640.

In addition to the down payment, Franecke alleges that he made "a total of $362,144 in separate property contributions in improvements, upgrades, and construction costs to the Miwok House." Section 2640, subdivision (b), provides that "[i]n the division of the community estate under [Division 7, Division of Property], unless a party has made a written waiver of the right to reimbursement or has signed a writing that has the effect of a waiver, the party shall be reimbursed for the party's contributions to the acquisition of property of the community property estate."

The trial court found that because "the term 'reimbursement' is a term of art in the Family Code," and because the PMA provided that in the event of the Miwok house's sale, Franecke would "receive reimbursement of the down payment only," Franecke waived his right to reimbursement under section 2640. This interpretation of the PMA strays too far from the plain language of that agreement.

The terms of the PMA expressly govern down payment reimbursement "[a]t such time as [the Miwok] house is sold," even if such a sale were to occur during the parties' marriage. In contrast, section 2640 pertains to the division of property under Division 7 of the Family Code that is "in a proceeding for dissolution of marriage or for legal separation of the parties," and even if the house is never sold. (§ 2550.) Because the reimbursements described in the PMA and section 2640, respectively, refer to different kinds of property rights contingent on different events, it was an error to conflate them. Accordingly, the trial court's observation that the word "reimbursement" did not appear in the premarital agreement addressed in *In re Marriage of Carpenter* (2002) 100 Cal.App.4th 424, makes a distinction without a difference. In the present case, "reimbursement" in the context of the PMA is not the equivalent of the "reimbursement" described in section 2640.

Other than the trial court's "term of art" reasoning, there is no reason to believe Franecke waived his rights under section 2640. "The waiver of a legal right requires an intentional act with knowledge of the right being waived. 'There must be "an actual intention to relinquish it or conduct so inconsistent with the intent to enforce that right in question as to induce a reasonable belief that it has been relinquished." ' " (*In re Marriage of Carpenter* (2002) 100 Cal.App.4th 424, 428–429.) Franecke evinced no actual intention to relinquish his section 2640 rights, and any argument that he acted inconsistently with his intent to enforce his section 2640 rights presupposes the erroneous conflation of "reimbursement" rights addressed above.

Thus, while the terms of the PMA limited reimbursement of the down payment to $350,000, if Franecke made separate property contributions to the Miwok house apart from the down payment, then under section 2640, he has the right to reimbursement for

those. On remand, the trial court should determine whether Franecke met his burden of proof with respect to the $362,144 in claimed separate property contributions to improvements and upgrades to the Miwok house. (See *In re Marriage of Cochran*, 87 Cal.App.4th 1050, 1057–1058, 1060 [rejecting husband's claim under § 2640 because he failed to meet his burden of establishing his entitlement to reimbursement].)

IV. The Trial Court Did Not Abuse Its Discretion in Finding That Franecke Was Barred by Laches from Seeking Recovery for Mortgage, Tax, and Insurance Payments Made for the Miwok House.

Franecke argues that the trial court erred in applying the doctrine of laches to his claim regarding Melkonian's failure to make mortgage and other payments pursuant to the PMA. "Generally speaking, the existence of laches is a question of fact to be determined by the trial court in light of all of the applicable circumstances, and in the absence of manifest injustice or a lack of substantial support in the evidence its determination will be sustained." (*Miller v. Eisenhower Med. Ctr.* (1980) 27 Cal.3d 614, 624.) Even where appellate courts have employed "the deferential abuse of discretion standard," they "do not disregard the evidence." (*Bono v. Clark* (2002) 103 Cal.App.4th 1409, 1417.) "[W]here the evidence is in conflict," an appellate "court will not disturb the trial court's findings." (*Cochran v. Rubens* (1996) 42 Cal.App.4th 481, 486.) Accordingly, we review the record for substantial evidence.

Section 1617 makes equitable defenses such as laches and estoppel available to either party in "an action asserting a claim for relief under a premarital agreement." The defense of laches bars a claim when the plaintiff unreasonably delays and either plaintiff has acquiesced in the act about which plaintiff complains, or the delay prejudices the defendant. (*Johnson v. City of Loma Linda* (2000) 24 Cal.4th 61, 77, citing *Conti v. Board of Civil Service Commissioners* (1969) 1 Cal.3d 351, 359.) Here, Franecke and Melkonian were married for more than a decade. At no time did Melkonian pay mortgage, tax, or insurance payments on the property. While Franecke testified that on several occasions he asked Melkonian when she would begin to help with the payments, Melkonian testified that they never discussed the issue. Thus, although there exists an

apparent conflict in the evidence, in Melkonian's testimony there is substantial evidence for the proposition that Franecke acquiesced to Melkonian's failure to make payments and delayed in making any objection to that failure.

DISPOSITION

The matter is remanded to the trial court to determine whether Franecke has met his burden of proof with respect to the $362,144 in claimed separate property contributions to the Miwok house under section 2640 and to award Franecke any property he is owed under that statute. In all other respects, the judgment is affirmed.

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BROWN, J.

WE CONCUR:

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STREETER, ACTING P. J.

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TUCHER, J.